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No. 10-920

In The
Supreme Court of the United States

ANA ROSA OCHOA,

Petitioner,

v.

ERIC H. HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR ADMINISTRATIVE LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTRODUCTION AND INTEREST OF THE AMICI CURIAE

The parties were notified and their consent to the filing of this brief was lodged with the Clerk of this Court in accordance with Supreme Court Rule 37.[1]

Amici Curiae are law professors who research, teach, and write on federal administrative law. The first issue presented in this case would answer an important question expressly left open in footnote 18 in *Kucana v. Holder*, 130 S. Ct. 827, 839 (2010) ("We express no opinion on whether federal courts may review the Board's decision not to reopen removal proceedings *sua sponte*."). Resolving this issue would provide much-needed clarification in a muddled area of the law.

Of particular interest to Amici Curiae is that, by answering that question, this case could provide guidance as to when an agency action is not reviewable by a court because it "is committed to agency discretion by law." 5 U.S.C. §701(a)(2) (2010). This particular exception has been difficult for lower courts to apply consistently. Amici Curiae are interested in the development of a more consistent and workable standard

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[1] In accordance with Supreme Court Rule 37.6, Amici Curiae certify that no counsel for any party in this case authored this brief in whole or in part, and furthermore, that no person or entity, other than Amici Curiae, has made a monetary contribution specifically for the preparation or submission of this brief

for applying Section 701(a)(2). More information about the specific interest of each law professor is provided below.

Jonathan H. Adler is Professor of Law and Director of the Center for Business Law & Regulation at the Case Western Reserve University School of Law, where he teaches courses in administrative, environmental, and constitutional law. Much of his scholarship focuses on questions of administrative law and agency action, including *The Rest Is Silence:* Chevron *Deference, Agency Jurisdiction, and Statutory Silences*, 2009 UNIVERSITY OF ILLINOIS LAW REVIEW 101 (2009) (co-authored with Nathan Sales).

Professor Bill Araiza is Professor of Law at Brooklyn Law School. His teaching and scholarly interests are in administrative and constitutional law, and he has published widely in these areas. He has served as a board member of the Western Law Center for Disability Rights in Los Angeles, and is a member of the Los Angeles County Bar's Sexual Orientation Bias Committee, and is currently on the Rulemaking Committee of the American Bar Association's Section on Administrative Law.

Jack M. Beermann is Professor of Law and Harry Elwood Warren Scholar at Boston University School of Law and is a Visiting Professor of Law at Harvard Law School for Spring 2011. Professor Beermann is a co-author of a leading administrative law casebook

and has published books and articles that address reviewability under the APA.

Bernard W. Bell, a professor at Rutgers Law School (Newark), teaches and writes in the areas of administrative law, constitutional law, and statutory interpretation. He has been on the Governing Council of the ABA's Section of Administrative and Regulatory Law.

Professor Andy Hessick, who joined the Arizona State University College of Law faculty in 2008, teaches civil procedure, administrative law, the Supreme Court in American politics, and judicial remedies. His scholarly work has focused on, among other things, administrative law and federal jurisdiction issues.

Claire R. Kelly is Professor of Law and Associate Director of the Dennis J. Block Center for the Study of International Business Law at Brooklyn Law School. She has taught administrative law for the past ten years, and has written on administrative law topics, including standard of review, in major law reviews.

Harold J. Krent is dean and professor at IIT Chicago-Kent College of Law. He has written several articles about the scope of judicial review of administrative discretion; served as associate reporter for the Restatement of the APA; and served as a consultant to the Administrative Office of U.S. Courts.

An Associate Professor at Catholic University Law School, Professor Amanda Leiter teaches administrative law, environmental law, and torts. Her

teaching and research interests include administrative law and process, and environmental law and policy. In 2009, the Supreme Court appointed Leiter to brief and argue a reviewability case, *Kucana v. Holder*, 130 S. Ct. 827 (2010), as amicus curiae in support of the judgment below.

Professor Sy Moskowitz is a professor of law at Valparaiso Law School. He teaches administrative law and is the author of many articles on administrative law topics.

Professor James T. O'Reilly of the University of Cincinnati College of Law has been quoted in past Supreme Court opinions on administrative procedure matters and is the author of 43 books including annual editions of his leading West treatise, ADMINISTRATIVE RULEMAKING. He has studied issues of discretion and agency responsibilities for more than 35 years and about 20 of his 180 articles deal with the review of agency discretionary choices. He urges the clarification of this overly grey area by the Court.

Professor Richard Pierce is the most frequently cited scholar in the country in the field of administrative law and government regulation. He is a member of the Administrative Conference of the United States, and is the author or co-author of ADMINISTRATIVE LAW TREATISE (5th ed. 2010) and ADMINISTRATIVE LAW & PROCESS (5th ed. 2009), as well as numerous other books and over 120 articles on government regulation, regulatory economics, and the effects of various

forms of government intervention on the performance of markets.

Dru Stevenson is a professor of law at South Texas College of Law in Houston, where he teaches administrative law, environmental law, and law & economics, among other subjects. Professor Stevenson has authored several articles on administrative law topics. Prior to entering the academy, he practiced as an Assistant Attorney General in the state of Connecticut in the Environmental Division and as a legal aid lawyer focused on administrative hearings for benefits claimants.

Peter L. Strauss is Betts Professor of Law at Columbia Law School, senior editor of a leading casebook on administrative law and the author of ADMINISTRATIVE JUSTICE IN THE UNITED STATES (2d Ed. 2003 Carolina Academic Press). His extensive bibliography includes several articles discussing *Citizens to Preserve Overton Park, Inc. v. Volpe*, and the implications of the delegation doctrine for the reviewability of discretionary administrative acts.

Rod Sullivan is Professor of Law at Florida Coastal School of Law where he teaches constitutional and administrative law. He successfully argued before the Court in the case of *Atlantic Sounding Co. v. Townsend*, 129 S. Ct. 2561 (2009).

Professor Kathryn A. Watts is an assistant professor of law at the University of Washington School

of Law, where she teaches administrative law, constitutional law, and Supreme Court decision making. Her research focuses primarily on interaction between the federal courts and executive actors, with a particular emphasis on interaction between the judiciary and administrative agencies.

Stephen I. Vladeck is a professor of law at American University Washington College of Law, where his teaching and research focus on federal jurisdiction, constitutional law (especially the separation of powers), national security law, and immigration law. Vladeck, much of whose scholarship has been focused on the scope of the Constitution's protections for access to judicial review, served as co-counsel for the Petitioner in *Nken v. Holder*, 129 S. Ct. 1749 (2009), and co-authored an amicus brief on behalf of law professors in support of the Petitioner in *Kucana v. Holder*, 130 S. Ct. 827 (2010).

STATEMENT

1. The law on the reviewability of administrative decisions began early in this nation's history. In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the Court carefully noted that what compelled the result was a statute that assigned a specific duty – the provision of a commission to anyone appointed by

the President as a justice of the peace – to the Secretary of State. *See id.* at 166. The Court made clear, however, that its job was "not to enquire how the executive, or executive officers, perform duties in which they have discretion." *Id.* at 170. This important distinction resulted in a presumption against reviewability of agency action throughout the nineteenth century. *See* RICHARD J. PIERCE, JR., 3 ADMINISTRATIVE LAW TREATISE §17.5, at 1582-84 (5th ed. 2010).

In 1902, however, the Court changed course in *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94. Permitting review of a Postmaster's fraud order, the Court explained:

> That the conduct of the postoffice is a part of the administrative department of the government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by any action by the head, or one of the subordinate officials, of that Department. . . . The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief.

Id. at 108. The Court subsequently found a series of administrative decisions reviewable. *See, e.g., Dismuke v. United States*, 297 U.S. 167 (1936) (allowing judicial review of determination whether certain service qualified individual for retirement benefits); *Shield v. Utah Idaho Cent. R.R. Co.*, 305 U.S. 177 (1938)

(permitting judicial review of whether railroad was an "interurban electric railway," which would exempt railroad from certain labor requirements).

Despite these signals toward permitting more judicial review, the Court never firmly denounced the presumption against judicial reviewability. As a result, Professor Richard Pierce describes this period as one in which there was "no presumption either way." *See* PIERCE, §17.6, at 1591. It appears that the Court was open to judicial review in some situations – particularly when issues of statutory interpretation were at issue, *see Stark v. Wickard*, 321 U.S. 288 (1944) – but was closed to it in others – particularly where, among other things, the relevant statute afforded an executive official an opportunity to make a decision in his or her personal judgment. *See United States v. George S. Bush & Co.*, 310 U.S. 371 (1940) (finding unreviewable a decision to approve certain tariffs under a statute that provided the President could do so "if in his judgment such rates of duty and changes are shown by such investigation . . . to be necessary to equalize such differences in costs of production").

2. In 1946, the Administrative Procedure Act ("the APA") was passed. The APA was a compromise between supporters and opponents of the New Deal, one that was "hard-fought . . . [and] left many legislators and interest groups far from completely satisfied." George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1560 (1996); *see* Martin Shapiro, *APA: Past, Present, & Future*, 72

VA. L. REV. 447, 452-53 (1986). One consequence of this compromise is that the APA's text points in conflicting directions on the issue of agency discretion and judicial review. *See id.* at 454; Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 695 (1990). On the one hand, Section 701(a)(2) announces that the APA's judicial review chapter does not apply to "agency action committed to agency discretion by law." On the other, Section 706(2)(A) specifically permits judicial review of agency action for, among other things, "an abuse of discretion."

As a result, one cannot read the command of Section 701(a)(2) as literally denying review to the range of agency actions that involve some discretion, because that interpretation would render Section 701(2)(A)'s review for "an abuse of discretion" a nullity. As such, "the need for a restrictive, and perhaps artificial, reading of the phrase 'committed to agency discretion' has been universally acknowledged since the earliest days of the APA." Levin, *Understanding Unreviewability*, at 695.

3. The legislative history of Section 701(a)(2) provides few answers. Both the House and Senate committee reports make clear that all agency action can be reviewed for abuse of discretion, seemingly rendering Section 701(a)(2) meaningless. *See id.* at 696. In particular, both reports suggest that Section 701(a)(2) simply restates "the truism that, when an agency has been granted broad discretionary powers, its actions are likely to be lawful and therefore

immune from judicial reversal." *Id.* This is not, however, an argument for no judicial review; it is, instead, an argument that certain actions will always survive judicial review.

4. The tension between 701(a)(2)'s text and its legislative history led to an epic scholarly debate. Professor Raoul Berger, drawing on the APA's legislative history, argued that Section 701(a)(2) did not render any agency action unreviewable. On the other side, Professor Kenneth Culp Davis, echoing the Attorney General's position, claimed that there were indeed actions that were unreviewable under Section 701(a)(2). *See* U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE APA 94 (1947) (Section 701(a) was intended "to restate the existing law as to the area of reviewable agency action"). *See generally* Raoul Berger, *Administrative Arbitrariness: A Synthesis*, 78 YALE L.J. 965, 966 n.9 (1969) (noting eight prior installments in the debate, four by Professor Berger and four by Professor Davis).

Despite the many years that have passed since Berger and Davis' debate, this Court has decided only a handful of cases that attempt to explain and apply the section.

5. In this case, Petitioner Ochoa seeks review of the Eighth Circuit's refusal to review the Board of Immigration Appeals' ("BIA's") denial of her motion to reopen her case. The Eighth Circuit's decision cites a prior decision of the circuit, *Tamenut v. Mukasey*, 521 F.3d 1000, 1005 (8th Cir. 2008), in which the court

concluded that a decision like the one made here "'is committed to agency discretion by law' [under Section 701(a)(2)] and is thus unreviewable by an appellate court." Petn. App. 6a-7a. The court explained:

> When a plaintiff complains about an action that is committed to agency discretion by law, it does not mean that a court lacks subject matter jurisdiction over the claim. Instead, it means that there is no law to apply because the court has no meaningful standard against which to judge the agency's unfettered exercise of discretion.

Id. at 7a-8a. It is this question, the scope of Section 701(a)(2)'s exception, on which Petitioner seeks this Court's review.

SUMMARY OF ARGUMENT

This Court has given conflicting interpretations of Section 701(a)(2)'s "committed to agency discretion" exception from judicial review. The exception has long been the source of great debate among commentators, and it continues to confound the lower courts. Amici Curiae urge this Court to grant certiorari in this case in order to provide much-needed guidance on the proper interpretation of this exception.

ARGUMENT

I. This Court's "Committed to Agency Discretion" Precedent Has Provided Conflicting Signals as to Section 701(a)(2)'s Scope

In *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), this Court established a presumption of reviewability under the APA: "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Id.* at 141. As a result, agency actions that qualified for the APA's exceptions to judicial reviewability, including unreviewability under Section 701(a)(2), were rare.

This Court construed Section 701(a)(2) in light of that presumption in a few brief sentences in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). There, the Court ruled that the Secretary of Transportation's decision to fund a highway through a park

> does not fall within the exception for action "committed to agency discretion." This is a very narrow exception. The legislative history of the Administrative Procedure Act indicates that it is applicable in those rare instances where "statutes are drawn in such broad terms that in a given case there is no law to apply." S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945).

Id. at 410 (footnote and internal citation omitted).

Two important lessons emerged from *Overton Park*. First, the Court held that Section 701(a)(2)'s exception is "very narrow." Second, the Court opted for an interpretation that followed the "truism" noted in the legislative history: When an agency acts under a broad mandate, its actions will necessarily survive review.

Several commentators have remarked on the difficulty of applying *Overton Park*'s "no law to apply" test. *See, e.g.*, PIERCE, §17.6, at 1593-95. As Professor Levin has observed, this test might better be characterized as the futility theory: "[A]n action should be deemed 'committed to agency discretion' if judicial review would be infeasible and therefore futile." Levin, *Understanding Unreviewability*, at 707. The futility theory may make sense when the inquiry is "whether the agency used legally relevant factors in exercising its discretion." *Id.* If there are no "factors" for the agency to apply, a court cannot conduct this inquiry. *See id.* at 707-08. It does not make sense, however, when another theory supplies the content of abuse of discretion review, such as that "the agency misunderstood the facts, . . . departed from its precedents without a good reason, . . . did not reason in a minimally plausible fashion, or . . . made an unconscionable value judgment." *Id.* at 708.

The acknowledged shortcomings of the "no law to apply" test did not, however, lead to its demise. Instead, during this time, the Court reaffirmed its presumption in favor of judicial review but added nothing to the *Overton Park* test. *See Dunlop v.*

Bachowski, 421 U.S. 560, 567-68 (1975) (allowing review of agency decision not to bring an action against a union).

In light of these developments, some circuit courts attempted to follow the literal terms of *Overton Park* by denying judicial review whenever the statute was viewed as too broad to provide any guidance on its application. *See Jaymar-Ruby, Inc. v. FTC*, 651 F.2d 506, 510-13 (7th Cir. 1981) (finding agency action committed to discretion when the statutory language permitted "the Commission [to] disclose such information . . . to any officer or employee of any State law enforcement agency upon the prior certification . . . that such information will be maintained in confidence and will be used only for official law enforcement purposes"); *Greater New York Hosp. Ass'n v. Mathews*, 536 F.2d 494, 497-98 (2d Cir. 1976) (holding unreviewable agency action on timing of payments because the statute said that "provider[s] of services shall be paid, at such time or times as the Secretary believes appropriate (but not less often than monthly)").

Other circuits, by contrast, eschewed that approach in favor of the First Circuit's pre-*Overton Park* decision in *Hahn v. Gottlieb*, 430 F.2d 1243 (1st Cir. 1970). In *Hahn*, the First Circuit embraced a pragmatic approach, based largely on Professor Harvey Saferstein's study identifying factors courts had relied on when applying Section 701(a)(2). *See id.* at 1249 (citing Harvey Saferstein, *Nonreviewability: A Functional Analysis of 'Committed to Agency Discretion,'* 82 HARV. L. REV. 367 (1968)). The D.C. Circuit, in fact,

equated *Overton Park*'s "no law to apply" test with this pragmatic test. *See Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1043 (D.C. Cir. 1979) ("In practice the determination whether there is 'law' to apply necessarily turns on pragmatic considerations as to whether an agency determination is the proper subject of judicial review.").

By 1985, the circuit courts were deeply divided on the test for Section 701(a)(2). *See* Levin, *Understanding Unreviewability*, at 711. This Court then granted certiorari in *Heckler v. Chaney*, 470 U.S. 821 (1985), a decision out of the D.C. Circuit that then-Judge Scalia had criticized for failing to follow the *Overton Park* test. *See Chaney v. Heckler*, 724 F.2d 1030, 1030-31 (D.C. Cir. 1984) (Scalia, J., dissenting from denial of rehearing en banc).

In *Heckler v. Chaney*, eight death row prisoners wrote the Food and Drug Administration asking the agency to begin enforcement actions against prison officials who were using lethal drug injections in a manner that they alleged was inconsistent with the Food, Drug, and Cosmetic Act. When the agency refused, the prisoners sought judicial review of the decision not to enforce. *See* 470 U.S. at 823.

The Court began its opinion by noting that "[t]his Court has not had occasion to interpret this second exception in §701(a) in any great detail." *Id.* at 828. The Court then again endorsed the *Overton Park* test:

> [E]ven where Congress has not affirmatively precluded review, review is not to be had if

> the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. In such a case, the statute ("law") can be taken to have "committed" the decisionmaking to the agency's judgment absolutely. This construction avoids conflict with the "abuse of discretion" standard of review in §706 – if no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for "abuse of discretion."

Id. at 830.

The Court, however, did not end its analysis there. Instead, it turned to various practical factors that explained the "general unsuitability for judicial review of agency decisions to refuse enforcement." *Id.* at 831. These include (1) a concern about interfering with an agency's "proper ordering of its priorities," (2) the lack of an "exercise [of an agency's] coercive power over an individual's liberty or property rights," which would implicate areas that the courts normally protect, (3) the lack of a focus for judicial review because we do not ultimately know what the agency would or would not have done had it acted, and (4) the parallel to prosecutorial discretion, the exercise of which has long been recognized as unreviewable except in very limited circumstances. *Id.* at 832. Given these several factors, it appeared that the *Heckler* Court was creating a complex test for Section 701(a)(2) that went beyond *Overton Park*. Unfortunately, it was

not clear how all these factors should fit together, nor how they would be reconciled with the "no law to apply" test in future cases.

In 1987, the Court decided *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270 ("*BLE*"), which seemed to continue *Heckler*'s project by embracing a more functional test for applying Section 701(a)(2). Indeed, in holding that the agency's denial of reconsideration was unreviewable, *BLE* did not mention *Overton Park*'s "no law to apply" test. Instead, it pointed to several factors – including the difficulty of reviewing denials made without a statement of reasons, and the difficulty of devising standards of review for these cases – as the basis for finding the agency's action unreviewable. *See id.* at 282-84.

The Court's next major unreviewability case was *Webster v. Doe*, 486 U.S. 592 (1988). There, the Court held that the decision to discharge an employee from the Central Intelligence Agency was unreviewable except to the extent that the employee sought review of alleged constitutional violations. Unlike *BLE*, however, *Overton Park*'s "no law to apply" test was front and center in the Court's discussion. *See id.* at 599-600 ("We noted that, under §701(a)(2), even when Congress has not affirmatively precluded judicial oversight, 'review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" (quoting *Heckler*, 470 U.S. at 830)).

Justice Scalia, the author of *BLE*, argued in dissent that the Court's treatment of Section 701(a)(2) missed the mark: "The 'no law to apply' test can account for the nonreviewability of certain issues, but falls far short of explaining the full scope of the areas from which the courts are excluded." *Webster*, 486 U.S. at 608 (Scalia, J., dissenting). He then suggested that Section 701(a)(2) was "intended to refer to 'the "common law" of judicial review of agency action,'" *id.* (quoting *Heckler*, 470 U.S. at 832), and that there were a variety of traditional reasons that ought to be considered when determining unreviewability under Section 701(a)(2). These include "whether the decision involves a sensitive and inherently discretionary judgment call, whether it is the sort of decision that has traditionally been nonreviewable, and whether review would have disruptive practical consequences." *Id.* at 609 (citations and internal quotation marks omitted). Justice Scalia then chided the Court for its continued reliance on *Overton Park*: "All this law, shaped over the course of centuries and still developing in its application to new contexts, cannot possibly be contained within the phrase 'no law to apply.' It is not surprising, then, that although the Court recites the test it does not really apply it." *Id.* at 610.

The decision in *Webster* might have been based, as Professor Jack Beermann has suggested, on "the pre-APA understanding that judicial review is not available when a statute grants discretion in terms of personal judgment of an official." Jack M. Beermann, *Common Law and Statute Law in Administrative*

Law, 63 ADMIN. L. REV. 1, 8 (forthcoming Mar. 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1340513. This kind of "deeming clause" was at issue in *United States v. George S. Bush & Co.*, 310 U.S. 371 (1940), which was cited in the influential Attorney General's Manual on the APA as an example of when Section 701(a)(2) applies. *See* ATTORNEY GENERAL'S MANUAL ON THE APA at 94.

Justice Scalia's pointed critique in *Webster*, however, seemed to have an impact. In *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993), the Court concluded that the Director of Indian Health Service's decision to end a program was unreviewable under Section 701(a)(2). In so concluding, the Court weighed heavily the importance of leaving the management of agency resources and priorities to the agency: "[A]n agency's allocation of funds from a lump-sum appropriation requires 'a complicated balancing of a number of factors which are peculiarly within its expertise': whether its 'resources are best spent' on one program or another; whether it 'is likely to succeed' in fulfilling its statutory mandate; whether a particular program 'best fits the agency's overall policies'; and, 'indeed, whether the agency has enough resources' to fund a program 'at all.'" *Id.* (quoting *Heckler*, 470 U.S. at 831)); *see* Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 21 (2008). The more categorical approach to Section 701(a)(2) announced in *Lincoln* – "over the years, we have read §701(a)(2) to preclude judicial review of certain categories of administrative decisions that

courts traditionally regard as 'committed to agency discretion,'" 508 U.S. at 191 – seemed to indicate, despite the Court's claim to the contrary, a new take on Section 701(a)(2). The Court, however, has yet to elaborate much on what these categories might be, or how we might figure them out.

Instead, the most significant recent case discussing the limits of reviewability provided a new set of factors to consider. In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Court held that an agency denial of a rulemaking petition could be reviewed, albeit it under a "highly deferential" standard. *Id.* at 527. In so concluding, *Massachusetts* seemed to embrace *Lincoln*'s more functional or categorical approach to Section 701(a)(2), rather than the "no law to apply" test. It noted that "[a]s we have repeated time and again, an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities." *Id.* The opinion then held that, despite this presumption, "[i]n contrast to nonenforcement decisions, agency refusals to initiate rulemaking 'are less frequent, more apt to involve legal as opposed to factual analysis, and subject to special formalities, including a public explanation.'" *Id.* (quoting *American Horse Protection Ass'n, Inc. v. Lyng*, 812 F.2d 1, 4 (D.C. Cir. 1987)).

Taken as a whole, then, this Court's precedent seems to be trending away from sole reliance on *Overton Park*'s "no law to apply" test. Indeed, although the Court often cites *Overton Park*, it has strained to include within that test cases that might

better be explained on other grounds, such as personal judgment clauses, or as Professor Beermann has called them, "deeming clauses." *See* Beermann, *Common Law*, at 7-8. The Court's more recent cases have also articulated several factors and even categories that are important to determining whether Section 701(a)(2) applies – such as not wanting to interfere in resource allocation decisions or get involved in sensitive subject areas such as national security and military affairs – but the Court has yet to fill in many details. As such, it is unclear whether these factors and categories are exclusive – or where we might look to discover more such factors and categories. In simplest terms, there is no clear, coherent framework for evaluating claims of unreviewability under Section 701(a)(2). As a result, there is a state of confusion in the lower courts as to when Section 701(a)(2) applies.

II. Lower Courts' Confusion Concerning Section 701(a)(2) Has Far-Reaching Implications

As Petitioner has detailed, there is a great deal of confusion regarding whether the BIA's denial of a motion to reopen *sua sponte* is not reviewable at all under Section 701(a)(2), as the Eighth Circuit held in this case, or whether there might be review to the extent the agency addressed or applied a legal rule, as other circuits have held. *See* Petn. 16-19. The Eighth Circuit's approach to reviewability here clearly illustrates the continuing confusion over whether courts must follow *Overton Park*'s test – and the need for additional guidance from this Court.

The disagreement between the majority and dissent in *Tamenut v. Mukasey*, 521 F.3d 1000 (8th Cir. 2008) (en banc) – the decision that bound the panel decision this case – was, at bottom, a disagreement over the futility theory. The majority concluded that the statute at issue provided "no meaningful standard against which to judge the agency's exercise of discretion." *Id.* at 1003 (internal quotation marks and citation omitted). The dissent disagreed and noted that, because the standard of review was so deferential, "it may very well be that most BIA decisions that provide some reasons for not reopening will be summarily upheld. The critical factor, however, is that review is proper." *Id.* at 1006-07 (Beam, J., dissenting).

A recent Ninth Circuit case has suggested that the issue of review of *sua sponte* decisions ought to be reconsidered after this Court's recent decision in *Kucana v. Holder*, 130 S. Ct. 827 (2010):

> The overall thrust of *Kucana* suggests that sua sponte reopening should be subject to review. There is a longstanding tradition of judicial review of reopenings in immigration cases; there is no statute suggesting review is not available; there is a presumption favoring review; and there is a separation-of-powers concern against giving the Executive authority to withhold cases from judicial review.

Mejia-Hernandez v. Holder, 2011 WL 240357, at *4 (9th Cir. 2011). Notably, this explanation of why *sua*

sponte denials might be reviewable utilizes factors similar to those the Court has suggested are appropriate in its more recent Section 701(a)(2) cases, rather than the "no law to apply test."

The range of tests that have been applied by the circuits when applying the Section 701(a)(2) exception is as varied as the Court's tests. Many, however, have drawn on the Court's more recent articulated factors rather than the "no law to apply" test.

For example, in *Cody v. Cox*, 509 F.3d 606 (D.C. Cir. 2007), the court concluded that an action to compel the military to provide "high quality and cost-effective health care" was reviewable. *Id.* at 610. The court began by noting that the agency action at issue did not qualify for "one of the narrow categories" that satisfies the "strictures" of 701(a)(2). *Id.* "This case does not involve second-guessing executive branch decisions involving complicated foreign policy matters. Nor does it relate to an agency's refusal to undertake an enforcement action, or its determination about how to spend a lump-sum appropriation." *Id.* (citations and internal quotation marks omitted). The court then turned to the statutory language and concluded broadly that, "hav[ing] regularly found Congress has not committed decisions to agency discretion under far more permissive and indeterminate language," the action was reviewable. *Id.*

Likewise, in *Merida Delgado v. Gonzales*, 428 F.3d 916 (10th Cir. 2005), the court held unreviewable the Attorney General's decision not to permit aliens to

receive flight training due to a risk to aviation or national security. In so holding, the court focused on the nature of the risk at issue, concluding that "a judgment concerning aviation or national security must be made by those with the necessary expertise," and "[i]t is rarely appropriate for courts to intervene in matters closely related to national security." *Id.* at 920.

Moreover, the variety of tests that have been applied in the Section 701(a)(2) context has resulted in conflicting outcomes on whether particular agency actions are reviewable. Illustrative is the split on whether a decision to use a single BIA member for "streamlined" review of initial immigration decisions is reviewable. *Compare Tsegay v. Ashcroft*, 386 F.3d 1347, 1353 (10th Cir. 2004) (not reviewable) and *Ngure v. Ashcroft*, 367 F.3d 975, 983 (8th Cir. 2004) (same), *with Smriko v. Ashcroft*, 387 F.3d 279, 294 (3rd Cir. 2004) (reviewable) and *Chong Shin Chen v. Ashcroft*, 378 F.3d 1081, 1087 (9th Cir. 2004) (same). In concluding that the single-member review was not judicially reviewable, the Tenth Circuit, which was also summarizing the Eighth Circuit's conclusion, pointed to three factors: "(a) that the application of [the relevant rule] involves the complex allocation of agency resources, (b) that it was not intended to create substantive rights for aliens, and (c) that judicial review would have disruptive practical consequences and would be unworkable in any case." *See Tsegay*, 386 F.3d at 1356 (citing the Eighth Circuit's decision in *Ngure*, 367 F.3d at 983-85). The Third and

Ninth Circuits, in contrast, looked to whether there is law to apply in the more traditional sense and found that the language in the statute provided criteria that cabins the BIA's discretion, thus making the decision reviewable. *See Chong Shin Chen*, 378 F.3d at 1088; *Smirko*, 387 F.3d at 292-93.

Finally, the confusion over Section 701(a)(2)'s contours for determining whether an action is unreviewable has also led to tension with the nondelegation doctrine's "intelligible principle" requirement. *See Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 472 (2001); *cf. Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (D.C. Cir. 1976) (Leventhal, J., concurring) ("Congress has been willing to delegate its legislative powers broadly and courts have upheld such delegation because there is court review to assure that the agency exercises the delegated power within statutory limits. . . ."). In *South Dakota v. Department of the Interior*, 69 F.3d 878 (8th Cir. 1995), *vacated, Department of Interior v. South Dakota*, 519 U.S. 919 (1996), the Department of the Interior acquired commercial land that was to be held in trust for the Lower Brule Tribe of Sioux Indians. *Id.* at 880. When the City and State sought review of the Secretary's decision, the Secretary claimed, among other things, that his decision was unreviewable under Section 701(a)(2). *Id.* The Eighth Circuit concluded instead that the statute was so broad that it violated the nondelegation doctrine. *See id.* at 885. This Court later vacated that decision when the Department changed its position and agreed that judicial review

was, in fact, available. *See Department of Interior v. South Dakota*, 519 U.S. 919, 920 (1996) (Scalia, J., dissenting).

Without a coherent approach for determining whether an agency action falls under Section 701(a)(2), lower courts will continue to be inconsistent in their application of the exception, which will perpetuate conflict and confusion. This Court's further guidance on the appropriate test is needed.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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